

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

CHRISTINA PAOLI,)	
)	
Defendant below,)	
Appellant)	C.A. No. 04-08-092
)	
vs.)	
)	
GERALD DIMATTEO and)	
CATHERINE DIMATTEO,)	
)	
Plaintiffs below,)	
Appellees.)	

Submitted November 23, 2005
Decided January 4, 2006

Christina Paoli, *Pro Se*, Defendant below/Appellant
Robert H. Robinson, Jr., Esquire, counsel for Plaintiff below/Appellee

**DECISION ON APPEAL FROM COMMISSIONER'S
RECOMMENDATION**

The Appellant/Defendant below, Christina Paoli (“Defendant”), appeals the Commissioner’s recommendation that her appeal from the Justice of the Peace Court’s (“J.P. Court”) judgment in favor of the Appellees/Plaintiffs below, Gerald and Catherine DiMatteo (“Plaintiffs”), be dismissed and remitted to the J.P. Court due to the Defendant’s failure to prosecute the appeal. For the following reasons, the recommendation of the Commissioner is accepted and affirmed.

BACKGROUND

On August 18, 2004, the Defendant timely filed her notice of appeal from the final judgment of the J.P. Court. The Plaintiffs timely responded to the

appeal and filed their Complaint on Appeal on September 10, 2004. The certificate of service attached to the complaint certifies that a copy thereof was mailed to Defendant at the address she provided the Court in her notice of appeal on September 10, 2004. Defendant did not file an answer to the Complaint within twenty days as required by Civil Rules 72.3 and 12. On April 20, 2005 the Court mailed notice to the parties under Rule 41(e) that the matter would be dismissed for failure to prosecute if no action was taken within ten (10) days. Apparently in response thereto, on April 29, 2005 the Defendant filed interrogatories propounded to the Plaintiffs. On May 5, 2005, the Plaintiffs moved to have the appeal dismissed or default judgment entered against the Defendant for failure to answer the Complaint on Appeal. The Defendant filed her “Response to Complaint on Appeal” at a hearing on the Plaintiffs’ motion before the Commissioner on June 6, 2005. On July 12, 2005, after vacating and withdrawing a prior report, the Commissioner issued his report recommending that the Defendant’s appeal be dismissed. The Defendant now appeals the Commissioner’s Recommendation.

STANDARD OF REVIEW

A recommendation to dismiss an appeal for failure to prosecute, pursuant to 10 *Del. C.* § 9574(b), is a case-dispositive matter. When reviewing case-dispositive matters, the Judge of the Court reviews the Commissioner’s decision *de novo*. CCP Civ. R. 112(A)(4)(iv).

DISCUSSION

Once a party files an appeal in this Court from an order of the lower Court, she must timely prosecute that appeal and comply with the Rules of this Court. Section 9574 (b) of Title 10 of the Delaware Code provides that “[i]f after entering

an appeal, the appellant neglects to prosecute it, or fails to comply with any rule, *or makes other default*, so that in a like case, in any other suit in Court, a nonsuit, non pros. or judgment by default would be entered, the Court *shall* dismiss the appeal, and remit the record to the justice, and give judgment for the respondent for costs; whereupon the justice shall strike off the appeal.” (*Emphasis added.*) *See also City of Dover v. Myers*, 2005 WL 147940, *2 (Del. Super.). Accordingly, the crucial question before the Court is whether the Appellant diligently pursued her appeal from the J.P. Court. The Court finds that the Defendant’s failure to file an Answer for a period of nearly nine months after the Plaintiffs filed their Complaint constituted a failure to prosecute her appeal, and a default. If, in a “like case” the Plaintiff-Appellee herein had filed this matter as an original proceeding against the Defendant-Appellant, he would have been entitled to an entry of default judgment by the Clerk of the Court against the Defendant for failure to timely file an answer within twenty days. Thus, dismissal was appropriate pursuant to § 9574(b).

The Defendant provides several excuses for her failure to pursue her appeal. First, she submits that she did not receive the Complaint because the Plaintiff’s Answer was sent to an inaccurate address. Second, she alleges that her attorney failed to properly file an Answer on her behalf. Finally, she argues that § 9574(b) requires proof of negligent or willful conduct, which she contends she lacked. None of these excuses are compelling.

The Defendant contends that she never received the Plaintiffs’ Complaint on Appeal because it was not sent to the proper address. She alleges that her address had been changed due to a postal mistake. When a party’s address changes, they have a duty to inform the Court of that change. Here, the

Defendant failed to notify the Court or opposing counsel of her new address until the hearing on June 6, 2005. The Court's record indicates that the Complaint was sent to the Defendant at the same address that she listed on her Notice of Appeal. Furthermore, the Court concludes that the Defendant continued to receive mail at the address listed on her Notice of Appeal long after the Plaintiffs sent their Complaint because she responded to the Plaintiff's Motion to Dismiss, which was sent to her original address on May 5, 2005. Even if Defendant did not receive the Complaint, she failed to properly notify the Court and/or opposing counsel of her allegedly changed address. Defendant's failure to inform the court of her changed address is not excusable neglect under these circumstances, where, as the appellant, Defendant allowed this case to languish without action for nearly nine months. The Defendant had an affirmative duty to prosecute her appeal in this Court, whether or not she received the Plaintiffs' Complaint.

The Defendant submits that her failure to diligently pursue her appeal should be excused because she alleges that she retained an attorney, who failed to respond on her behalf. The Court has thoroughly reviewed the file and there is no evidence that would indicate that the Defendant retained an attorney to represent her in this appeal. Prior to answering the Complaint, the Defendant filed her request for interrogatories, which were submitted with a hand-written certificate of service and signed by her. In fact, every document submitted on the Defendant's behalf was submitted and signed personally by the Defendant. Thus, the Defendant provided no notice to the Court that she would be represented by counsel. No attorney filed an entry of appearance on Defendant's behalf. The Court is not convinced that the Defendant believed she would be represented in this appeal.

The Defendant lastly contends that her appeal should not be dismissed because § 9574 requires proof of negligent or willful misconduct, neither of which she contends has been established. This is an inaccurate interpretation of the statute. Neglect is but one of the grounds for dismissal of an appeal under § 9754. In any event, the facts before this Court clearly exhibit the Defendant's neglect in failing to prosecute her appeal for several months by failing to respond to the complaint on appeal.

The Court acknowledges that Defendant is, in effect, seeking relief from a default judgment against her, and that, generally, the Court resolves any doubts regarding defaults in favor of the petitioner because of the public policy to determine an action on its merits. *Keystone Fuel Oil Co. v. Del-Way Petroleum, Inc.*, 364 A.2d 826, 828 (Del. Super. 1976). However, in considering a default upon an appeal *de novo*, the parties have already once had their matter litigated and decided on its merits. Thus, the same policy considerations do not apply to defaults under § 9574.

For the foregoing reasons, the Court affirms and approves the Commissioner's finding that the Defendant failed to prosecute her appeal and defaulted in timely filing her answer to the complaint on appeal. Thus, the appeal is dismissed and remitted to the Justice of the Peace Court.

Plaintiffs are entitled to Judgment for Costs

When dismissal and remitter are appropriate under § 9574(b), the appellee is entitled to judgment for costs. At the hearing before the Commissioner, the Plaintiffs sought to be awarded costs, including attorney's fees. However, the Commissioner recommended that attorney's fees were not recoverable because they were not provided for by contract or by any statutory authority. The

Plaintiffs contend that the contractual lease between the parties provided that attorney's fees were recoverable. The Court has reviewed the lease, which was submitted with the Complaint on Appeal, and finds that the lease indeed provides for the recovery of reasonable attorney's fees. Therefore, costs, including reasonable attorney's fees are hereby awarded to the Plaintiffs.

CONCLUSION

After a *de novo* review of the law and facts, I find that the Commissioner's recommendation to dismiss the appeal pursuant to 10 *Del. C.* § 9574(b) was proper and is accepted. I further find that the Plaintiffs are entitled to judgment for costs, including reasonable attorney's fees. Counsel for Plaintiffs shall submit an affidavit of attorneys' fees within fourteen days. Defendant may respond to the submission within seven days thereof.

The Commissioner's Recommendation is **AFFIRMED** in part and **REVERSED** in part.

IT IS SO ORDERED, this 4th day of January, 2006.

Kenneth S. Clark, Jr.
Judge